

TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 02-27

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of the Tennessee sales and use tax to certain separately stated fees charged by a [TYPE OF BUSINESS] wholesaler and retailer.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[CORPORATION A] and [CORPORATION B] d/b/a [THE TAXPAYER] (hereinafter collectively referred to as “Taxpayer”) are major wholesalers and distributors of [TYPES OF SUPPLIES], primarily to [TYPES OF BUSINESSES]. The Taxpayer is currently considering implementing various fees for services rendered to its customers. The services are as follows:

- 1) Consulting Service - The Taxpayer provides consulting services to [TYPES OF BUSINESSES] to evaluate and provide analysis on how to set up their supply house, storeroom, and/or warehouse for the maximum efficiency. The Taxpayer’s customers do not have to make a purchase to be subject to the consulting service fee.
- 2) Employee Outsourcing Service - The Taxpayer provides short-term or long-term temporary employee services in which the Taxpayer’s employee is supervised by the customer. The services provided include, but are not limited to, administration, warehouseman, stock clerk, etc. The Taxpayer’s customers do not have to make a purchase to be subject to the employee outsourcing service fee.
- 3) Telephone Coverage Service - The Taxpayer maintains a person on call 24 hours a day for emergency orders. The telephone coverage service fee is charged even if the Taxpayer’s customer makes no purchases.
- 4) Reserve Inventory Service - The Taxpayer maintains a set quantity of items in inventory, pending the customer’s purchases. This is to assure that critical items will be in stock and immediately available for shipping to the customer. The title to this inventory remains in the custody of the Taxpayer until purchased by the customer. The reserve inventory service fee is charged even if the Taxpayer’s customer makes no purchase.
- 5) Sales Tracing Service - The Taxpayer provides a compilation of data on a customer’s purchases from the Taxpayer information system and generates various reports. The customer requests the reports in order to analyze their spending patterns, and identify items that are not purchased under contract so that they may reduce excess spending. This information is transmitted either electronically or via paper.
- 6) Restocking Service - The Taxpayer accepts goods that have been returned from its customers and returns them to its resale inventory when the customer has not used the goods in a way that decreases their value.
- 7) Parking - The Taxpayer leases or rents a portion of their parking lot to a neighboring company. The use of the parking lot is not limited to parking and can be used for other purposes.

The services specified in items (1) through (6) above, are all optional. The services are provided at the request of the Taxpayer's customer. If the customer doesn't request any of the six services, the customer will not receive nor be billed for them. When a customer is billed for any of the services, the amount of the fees will always be separately stated.

QUESTION

Are the fees for the services that the Taxpayer is considering implementing subject to Tennessee's sales or use tax?

RULING

No. The services that generate the fees are neither specifically enumerated as a service subject to the tax nor are they part of the taxpayer's sale and distribution of [TYPES OF SUPPLIES].

ANALYSIS

The Tennessee Retailers' Sales Tax Act (hereinafter the "Act") levies a tax on the sale of each item or article of tangible personal property sold at retail in this state. Tenn. Code Ann. § 67-6-202. A "sale at retail" means "a taxable sale of tangible personal property or specifically taxable services to a consumer or to any person for any purpose other than resale." Tenn. Code Ann. § 67-6-102(24)(A). The "sales price" of an item or article means "the total amount for which a taxable service or tangible personal property is sold, including any services that are a part of the sale of tangible personal property" Tenn. Code Ann. § 67-6-102(26).

Certain specifically enumerated services performed in Tennessee are also subject to the tax. See, Tenn. Code Ann. § 67-6-205.¹ Furthermore, even services that are not specifically enumerated as taxable can become subject to tax if they are performed as a part of a taxable sale of tangible personal property. See, Tenn. Code Ann. § 67-6-102(26). See also, *Thomas Nelson, Inc. v. Olsen*, 723 S.W.2d 621 (Tenn.1987).

Based on the foregoing, the various fees being contemplated by the Taxpayer will be subject to Tennessee's sales and use tax only if the services that generate the fees are either taxable in and of themselves in accordance with Tenn. Code Ann. §§ 67-6-102(24)(F) and 67-6-205, or are taxable as services that are a part of the sale of tangible personal property in accordance with Tenn. Code Ann. §§ 67-6-102(26) and 67-6-202.

The fees contemplated by the Taxpayer for consulting, employee outsourcing, telephone coverage, reserve inventory, sales tracing, and restocking are not specifically listed as taxable services under Tenn. Code Ann. § 67-6-102(24)(F). Therefore, unless one or more of the services will be performed as part of a taxable sale of tangible property, the service(s) will not be subject to tax.

¹ Tenn. Code Ann. § 67-6-102(24)(F) lists the specific services that are taxable under the Act.

Provided that a taxpayer's service is clearly optional and is either separately stated in the bill or separately billed, the charge for the service will not be part of the sales price of the sale of tangible personal property. See, *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669 (Tenn. 1990). As a result, the charge for the service will not be subject to Tennessee's sales tax.

Since the consulting, employee outsourcing, telephone coverage, reserve inventory and sales tracing services that are contemplated by the Taxpayer will be both optional and separately stated on the bill, those services will not be part of the sales price of the Taxpayer's sale of tangible personal property. The services will be separate and divisible from the sales of tangible personal property. Therefore, the services will not be subject to tax.

Likewise, the fees contemplated for the restocking service will not part of the sale of tangible personal property because with a merchandise return a buyer is due a full refund of the amount of sales tax paid. Thus, if merchandise is returned and a refund is given, the restocking service fee cannot be part of the sale of tangible personal property because no taxable sale occurred upon imposition of the restocking fee. As a result, the restocking service fee will not be subject to tax.

Unlike the first six enumerated services that the Taxpayer contemplates, the taxability of the parking fee that will be received from the lease or rent of a portion of its parking lot to a neighboring company, is not dependent upon the question of whether or not that service is part of the sale of tangible personal property. Clearly, there is no sale of tangible personal property connected with the parking fee. Instead, the taxability of the parking fee is dependent upon whether or not the fee is generated from a service that is taxable under the Act.

Under Tenn. Code Ann. § 67-6-102(24)(F)(ii) "[c]harges for services rendered by persons operating or conducting a garage, parking lot or other place of business for the purpose of parking or storing motor vehicles" is a service that is subject to tax. The Taxpayer's lease or rent of a portion of its parking lot to a neighboring company that may use it for purposes other than a parking lot does not constitute the operation of a parking lot or garage as contemplated by the statute. Therefore, the fees the Taxpayer is considering charging to a neighboring company will not be taxable.

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APPROVED:

Ruth E. Johnson
Commissioner

DATE: 8/2/02